Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRED V. VOGELSBERG,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Court of Appeals, District IV

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Maryland* v. *Craig*, 497 U.S. 836 (1990), this Court held that a child witness may be permitted to testify at trial outside the defendant's presence if face-to-face confrontation would cause more than *de minimis* emotional distress, later adding "at least where such trauma would impair the child's ability to communicate." *Id.* at 857. The questions presented are:

1. Whether *Craig* applies even when the emotional distress would not impair the witness's ability to testify.

2. Whether *Craig* should be reconsidered in light of this Court's more recent decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Fred V. Vogelsberg was defendant in the Wisconsin Circuit Court for Jefferson County, Branch 4, defendant-appellant in the Wisconsin Court of Appeals, District IV, and petitioner before the Wisconsin Supreme Court. Respondent State of Wisconsin was plaintiff in the circuit court, plaintiff-respondent in the court of appeals, and respondent before the Wisconsin Supreme Court.

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William Blackstone, *Commentaries on the Laws of England*:

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Richard Burn, *The Justice of the Peace, and Parish Officer* (London 10th ed. 1766) 27

Joseph Chitty, *A Practical Treatise on the Criminal Law* (London 1816) 25

Edward Hyde East, *A Treatise of the Pleas of the Crown* (London 1803) 27

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Thomas Peake, *A Compendium of the Law of Evidence* (London 1801) 25

S.M. Phillipps, *A Treatise on the Law of Evidence* (London 2d ed. 1815) (1814) 25

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John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (2d ed. 1923) 23

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Thomas Wood, *An Institute of the Laws of England* (London 9th ed. 1763) 25

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fred V. Vogelsberg respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Court of Appeals, District IV, in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is published at 724 N.W.2d 649 and 2006 WI App 228 (Wis. App. 2006). The Wisconsin Supreme Court's unpublished order denying review is reprinted at App., *infra*, 12a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 26, 2006. App., *infra*, 1a. The Wisconsin Supreme Court denied review on January 9, 2007. *Id.* at 12a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the

accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

STATEMENT OF THE CASE

The accused's right under the Confrontation Clause "to be confronted with the witnesses against him" was traditionally understood to "guarantee[] the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). In *Maryland* v. *Craig*, 497 U.S. 836 (1990), however, this Court upheld a statute that permitted a child witness to testify at trial outside the defendant's presence by one-way closed-circuit television. The Court allowed use of the procedure if necessary to avoid "more than *de minimis*" emotional distress to the witness. *Id.* at 855-856. Later in its opinion, however, the Court qualified its holding, adding that the procedure may be used "at least where such trauma would impair the child's ability to communicate." *Id.* at 857.

This petition asks the Court to resolve whether a defendant's confrontation rights may be thus abridged even if the trauma would *not* "impair the child's ability to communicate." The Supreme Courts of Connecticut, Kentucky, Missouri, and Tennessee have all interpreted the Confrontation Clause to require a showing that confrontation would impair the witness's ability to testify. The court below, by contrast, joined the highest courts of Colorado and Texas in concluding that no such showing is required. The petition also asks the Court to reexamine *Craig* in light of its more recent decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006). *Crawford* overruled *Ohio* v. *Roberts*, 448 U.S. 56 (1980), a case on which *Craig* heavily relied.

I. TRIAL COURT PROCEEDINGS

Mr. Vogelsberg is serving a 25-year sentence for allegations of child abuse. As in many child abuse cases, the charges—if true—are horrible. As in many child abuse cases, however, the evidence was fraught with ambiguity. There

was no forensic evidence, and the only eyewitness testimony came from the child himself, who at times denied the abuse and at other times claimed it had occurred. As a result, the State's case rested largely on hearsay statements the child had made to others. But the family that accused Mr. Vogelsberg had ample motive and opportunity to manufacture those statements through coaching and manipulation. Indeed, one of them admitted having falsely accused Mr. Vogelsberg of rape before. Despite that, Mr. Vogelsberg was not permitted to confront the child witness face to face at trial. Rather, the witness testified from behind a screen that shielded Mr. Vogelsberg from his view.

A. Background

Mr. Vogelsberg and his former wife Suzanne married in 1991 and separated in 2001. 9/23 Tr. 217. When they married, Suzanne already had four daughters: Jennifer, Amy, Heather, and Rako. *Id.* at 197-198. Mr. Vogelsberg's relationship with his stepdaughters was often rocky. According to his ex-wife, he "got too powerful with the kids or too headstrong with what was right and wrong" and laid down "[e]xcessive rules." *Id.* at 228. His stepdaughters complained about his "curfews"; they said his discipline "wasn't very accepted" and led to "run away episodes." 9/27 Tr. 8-9. The household "had a lot of problems" and "[s]omebody was always fighting with somebody." *Id.* at 28. For example, Mr. Vogelsberg would argue with his ex-wife after she took her underage daughters out to bars. 9/23 Tr. 154.

In May 1999, Mr. Vogelsberg's stepdaughter Heather gave birth to a son, Blake. 9/23 Tr. 206. In July 2003, Blake made statements to Suzanne, Amy, and Heather accusing Mr. Vogelsberg of molesting him. *Id.* at 218-219, 223-225; 9/27 Tr. 9-12.[1] Blake made similar statements to Rako and Jennifer, 9/23 Tr. 143-144, 194, and later to a foster parent,

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[1] Specifically, that "grandpa stuck his thumb up his butt" and "his pee pee in his mouth." 9/23 Tr. 218.

id. at 232. When the police called Mr. Vogelsberg to discuss the claims, he became so distraught that he stabbed himself. *Id.* at 234-235. The police spoke to him in the hospital; he denied the allegations, and speculated that Blake got the idea from watching *The Indictment*. *Id.* at 238.[2]

On April 1, 2004, the State charged Mr. Vogelsberg with one count of sexual assault of a minor in violation of Wis. Stat. § 948.02(1). C.A. R. Doc. No. 1. On May 18, 2004, Mr. Vogelsberg appeared for his preliminary hearing. The State's lead witness was Blake. In Mr. Vogelsberg's presence, Blake delivered 20 pages of lucid testimony under direct and cross-examination. 5/18 Tr. 7-26.[3] Blake stated that Mr. Vogelsberg had done "bad stuff" to him but denied being touched inappropriately, saying that Mr. Vogelsberg "only likes looking at it." *Id.* at 16-18. Other witnesses, however, recounted Blake's earlier statements, *id.* at 26-50, and the judge bound Mr. Vogelsberg over for trial, *id.* at 55.

B. The *Craig* Hearing

Relying on *Maryland* v. *Craig*, 497 U.S. 836 (1990), the State moved to permit Blake to testify at trial outside Mr. Vogelsberg's presence by closed-circuit television. C.A. R. Doc. No. 12; 9/17 Tr. 61-62. *Craig* requires at least three findings before allowing that procedure: (1) that the "procedure is necessary to protect the welfare of the particular

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[2] *Indictment: The McMartin Trial* is a made-for-TV movie about the McMartin preschool trial, the longest-running and most sensational child molestation case of the 1980s. Suggestive questioning by overzealous investigators in that case led to false reports of abuse by some children, as well as wild allegations of being terrorized by lions, molested in hot-air balloons, and forced to drink the blood of other children murdered in satanic rituals. *See* Paul & Shirley Eberle, *The Abuse of Innocence: The McMartin Preschool Trial* 22, 27 (1993); *Who Were the Real Abusers?*, Chi. Tribune, Dec. 31, 2005, at 28.

[3] Blake sat at a "child-sized table" facing the bench rather than the witness stand facing the defendant; nonetheless, he had an unobstructed view of Mr. Vogelsberg, acknowledging his presence and pointing him out in the course of his testimony. 5/18 Tr. 4, 15.

child witness who seeks to testify"; (2) "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" 497 U.S. at 855-856.

On September 17, 2004, the trial court held a hearing on the State's motion. Blake did not appear. Blake's new stepmother, Jaime Perry,[4] testified to his behavior on the drive back from the preliminary hearing. She said that Blake was "very antsy" and "very bouncy," and asked to stop to "go to the bathroom every ten or fifteen minutes." 9/17 Tr. 11-12, 20-21. She had later "vaguely told him that he would have to go to court again," but "[h]e didn't want to talk about it" and "ran off and went and played with [her] son." *Id.* at 13. Ms. Perry also described behavioral problems Blake had exhibited when first placed in her care, including being "very hyper," "act[ing] out sexually upon his brother," and soiling his bedroom; she also said that Blake once reported a bad dream about Mr. Vogelsberg, but "[t]hat's about as vague as he got with me." *Id.* at 10-11. Ms. Perry stated that those problems were improving over time, but offered no other evidence tying any of them to Blake's appearance at the preliminary hearing. *Id.* at 15. She nevertheless opined that testifying in Mr. Vogelsberg's presence again would "agitate" Blake, adding that she "[did]n't think it would be very good for him." *Ibid.*

The State's other witness was a therapist who testified by telephone. She said that she had met with Blake six times and that, in her opinion, it was "necessary to protect the welfare of Blake for the Court to employ some type of protective measure"; that "testimony in open court in front of Fred Vogelsberg would be emotionally damaging"; and

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[4] Blake had been removed from his mother's custody and placed in foster care, and then with Ms. Perry, several months earlier. 9/17 Tr. 15-16.

that it would cause "more than mere nervousness or excitement." 9/17 Tr. 25-27. The therapist did not elaborate on the basis for those opinions. Her entire direct testimony occupies approximately two transcript pages. *Ibid.*

A psychologist then testified for Mr. Vogelsberg. He observed that Blake's behavior could be explained by the stress of being separated from his family and placed in foster care. 9/17 Tr. 37-40. He also noted that Blake was on medication for Attention Deficit Hyperactivity Disorder. *Id.* at 37. He stated that, in some cases, testifying could be "therapeutic" for a child, although he did not have enough information to say whether that would be the case here. *Id.* at 40-42. He conceded that testifying was less likely to be therapeutic if the child felt "threatened." *Id.* at 43. He described the scientific literature on child-witness testimony as equivocal; some studies found short-term adverse effects, but "[i]t did not seem that the lasting effects of testimony were particularly negative." *Id.* at 43-44.

The State then argued that "the Court can make the findings under *Maryland vs. Craig* ... to warrant some type of protective measure for this child." 9/17 Tr. 61. Mr. Vogelsberg replied that the State's showing of trauma was insufficient to overcome his "right of confrontation" because it did not show that "Blake would be unduly harmed any more than in a d[e] minim[i]s manner by testifying in front of Mr. Vogelsberg." *Id.* at 64.

The court granted the State's motion. It noted the defense expert's testimony that "the likelihood of emotional harm" from testifying "would have a lot to do with whether the child felt threatened by the alleged perpetrator." App., *infra*, 16a. And it cited a September 18, 2003, police report, which noted Blake having stated that Mr. Vogelsberg, at the time of the abuse, had warned him "not to tell anyone or he would hurt him on his pee pee." *Ibid.* The court reasoned that Blake was thus "likely to suffer emotional harm if he is required to talk about the alleged sexual abuse in the

presence of the alleged perpetrator." *Id.* at 17a. Accordingly, the court made the three findings sought by the State: that "some type of barrier . . . is necessary to protect Blake's welfare," that "Blake would likely be traumatized by the defendant's presence," and that "the emotional stress . . . would be more than d[e] minim[i]s." *Ibid.* The court stated that, although it hadn't decided what mechanism to use, "Blake will not be able to see Mr. Vogelsberg and Mr. Vogelsberg will not be able to see Blake in the courtroom when Blake testifies during the trial on this action." *Id.* at 18a. The parties then agreed to use an opaque screen between Blake and Mr. Vogelsberg, rather than closed-circuit television, so that the jury would have a direct view of Blake when he testified. 9/17 Tr. 75-77.

The State did not argue, and the court did not find, that Blake would be *unable* to testify in Mr. Vogelsberg's presence, or that testifying in his presence would impair Blake's *ability* to testify. (Indeed, such a finding would be hard to square with the fact that Blake *had* testified, successfully, at the preliminary hearing.) To the contrary, the court approved the screen solely because "Blake would likely be traumatized by the defendant's presence *when he testifies*." App., *infra*, 17a (emphasis added).

C. The Trial

Mr. Vogelsberg's trial began on September 23, 2004. Suzanne, Jennifer, Rako, and Blake's former foster mother testified to Blake's earlier statements. 9/23 Tr. 143-144, 194, 218-219, 232. A police officer described Mr. Vogelsberg's suicide attempt. *Id.* at 234-238. And the State introduced evidence suggesting that Mr. Vogelsberg may have abused Rako many years earlier and threatened suicide if she revealed it, 9/23 Tr. 140-145, 222-223; 9/27 Tr. 44; the court admitted that evidence over a prior-bad-acts objection for the limited purpose of showing "context or background" or "consciousness of guilt," 9/14 Tr. 51-55; 9/23 Tr. 165-166.

Blake testified from behind a screen that blocked Mr. Vogelsberg from his view. 9/23 Tr. 170. The prosecutor began by asking a series of questions to establish that Blake knew the difference between the truth and a lie, and that people who lie "get in trouble"—the functional equivalent of an oath. See *id.* at 171-173. The prosecutor and defense counsel then questioned Blake about the alleged abuse. *Id.* at 173-191. Blake's testimony was conflicting. He initially said the abuse "didn't happen" and "wasn't real." *Id.* at 175. Later, he said he "didn't want to spend time" with Mr. Vogelsberg because he did "bad stuff." *Id.* at 181. Finally, he accused Mr. Vogelsberg of molestation, saying he had "touched [his] pee pee . . . [a] couple times." *Id.* at 190.

The defense presented two witnesses. The first, a psychologist, stated that children "sometimes report things that have not happened," and that a variety of factors influence false reporting, such as stress in a child's life or the nature of the questions. 9/24 Tr. 44-45. He noted that younger children are particularly susceptible. *Id.* at 45.

The defense also called one of Mr. Vogelsberg's stepdaughters, Amy, as a witness. She admitted having previously filed a false police report accusing Mr. Vogelsberg of sexual assault. 9/27 Tr. 26. She explained that she and her sister Jennifer had been "trying to figure out a way to get [Mr. Vogelsberg] out of the house" and that she filed the report to "get him out of the house so we could do what we wanted to do." *Id.* at 26-27. She testified that she had told Jennifer she was going to file the report and told her it had "no basis in fact," and that Jennifer did not discourage her. *Id.* at 27-28. (Jennifer denied "becom[ing] involved" but did not deny awareness of the false accusation. *Id.* at 31.)

In closing, the State conceded that Blake's testimony was conflicting but urged the jury to rely on the incriminating portions. 9/27 Tr. 51-52. Mr. Vogelsberg countered that his stepdaughters were a "dysfunctional family" and that Blake, a young child, could be "convinced that something

actually happened, where it may not have happened." *Id.* at 57-58. The jury found Mr. Vogelsberg guilty. *Id.* at 82. On October 7, the court sentenced him to 25 years' imprisonment and 15 years' supervised release. 10/7 Tr. 33.

II. PROCEEDINGS IN THE COURT OF APPEALS

Mr. Vogelsberg appealed, and the court of appeals affirmed. App., *infra*, 11a. The court first addressed Mr. Vogelsberg's argument that *Craig* "should no longer be considered good law" in light of *Crawford* v. *Washington*, 541 U.S. 36 (2004), and that "courts should find no exceptions to the literal guarantee of face-to-face confrontation." C.A. Br. 5. The court of appeals conceded that there is "language from *Crawford* that would appear to call into question the continued validity of *Craig*." App., *infra*, 7a. It identified several passages that "suggest that *Craig*'s days may be ripe for review." *Ibid.* But the court of appeals opined that, "[h]ad the Supreme Court intended to overrule *Craig*, it would have done so explicitly." *Id.* at 8a. The court also opined that the cases addressed "distinct" issues. *Ibid.* *Crawford* dealt with "out-of-court 'testimonial evidence' where the witness was not available for cross-examination," while *Craig* addressed use of a "barrier" at trial that prevented face-to-face confrontation but preserved defense counsel's ability to cross-examine. *Ibid.*

The court of appeals then turned to Mr. Vogelsberg's argument that, even if *Craig* remained good law, "*Craig*'s exception applies only where the 'trauma would impair the child's ability to communicate.'" C.A. Br. 6 (quoting 497 U.S. at 857). The court of appeals (like the State) did not dispute that "the trial court made no finding the trauma to Blake ... would impair his ability to communicate the facts." *Ibid.* Instead, the court of appeals "disagree[d]" with Mr. Vogelsberg's contention that such a finding was required. App., *infra*, 9a. The court acknowledged *Craig*'s statement that its holding applied "'at least where such trauma would impair the child's ability to communicate.'"

Id. at 9a-10a (quoting 497 U.S. at 857) (emphasis omitted). But the court opined that "Vogelsberg's view is based on [that] one phrase in *Craig*, which he reads to the detriment of the case-specific, multi-factored test of necessity set forth in that decision." *Id.* at 9a. The court continued:

> Nowhere else does *Craig* suggest that the focus of the necessity inquiry should be on whether the trauma would impair the child's ability to give testimony. In fact, a categorical requirement that the child's trauma must be such that he or she cannot speak would run counter to the detailed, three-part test to determine the necessity of a special procedure to shield the child witness from the accused. Furthermore, we have applied *Craig* in the past and have not read it to impose such a requirement.

Id. at 10a. Noting that Mr. Vogelsberg did not dispute the other three findings required by *Craig*, the court of appeals affirmed his conviction. *Id.* at 10a-11a.

III. PROCEEDINGS IN THE STATE SUPREME COURT

Mr. Vogelsberg filed a petition for review in the Supreme Court of Wisconsin, arguing that his "state and federal constitutional right to face-to-face confrontation of the witnesses against him was violated" because "(a) the state and federal constitutions guarantee face-to-face confrontation without exception" and "(b) if there is an exception . . . , the trial court here failed to make the finding required by [*Craig*] that 'trauma would impair the child's ability to communicate.'" Pet. for Review 1. The State conceded that the petition "probably satisfies the criterion for [the] court's review" because it raised a "'real and significant'" constitutional question. State Resp. 1-2. Nonetheless, it urged denial because the court of appeals had issued a "flawless" opinion that "can simply be allowed to stand as the expression of Wisconsin law on the issue presented." *Id.* at 2. The Wisconsin Supreme Court denied review on January 9, 2007. App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

This case concerns a split among state supreme courts and legislatures over one of the most fundamental procedural guarantees in the Bill of Rights—the right of the accused "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause was traditionally understood to "guarantee[] the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). Nevertheless, in *Maryland* v. *Craig*, 497 U.S. 836 (1990), this Court upheld a statute that permitted a child witness to testify outside the defendant's presence at trial by one-way closed-circuit television. The Court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. The Court conditioned use of the procedure on at least three findings: (1) that the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* at 855-856.

Craig, however, did not squarely resolve whether emotional distress was by itself sufficient to justify denial of confrontation, or whether instead that trauma had to impair the witness's ability to testify. The portion of the Court's opinion that set forth the three conditions focused on the emotional distress itself. See 497 U.S. at 855-856. Elsewhere, however, the Court suggested that impairment of ability to testify might also be required. For example, a concluding paragraph stated that the holding applies "at least where such trauma would impair the child's ability to

communicate." *Id.* at 857. The Court also noted that, "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal"—a rationale that presumes impairment of ability to testify. *Ibid.* And the dissent asserted, without rejoinder, that the majority's holding requires "that the child [be] unable to testify in the presence of the defendant." *Id.* at 866 & n.1 (Scalia, J., dissenting).

State courts and legislatures are now hopelessly divided over whether *Craig*'s exception applies even where confrontation would not impair the witness's ability to testify. That important and recurring conflict is by itself more than ample reason to grant the petition. But there is also a more fundamental reason to grant review—to address *Craig*'s continuing vitality in light of this Court's more recent decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006). Those decisions radically altered the Court's approach to the Confrontation Clause and overruled *Ohio* v. *Roberts*, 448 U.S. 56 (1980), a case on which *Craig* heavily relied. *Crawford* and *Davis* have led many—including the court below—to speculate that "*Craig*'s days may be ripe for review." App., *infra*, 7a. The discord between *Craig*—a closely divided decision with a vigorous dissent—and this Court's more recent decisions also weighs heavily in favor of review.

I. THIS COURT SHOULD RESOLVE WHETHER *CRAIG* APPLIES WHEN CONFRONTATION WOULD NOT IMPAIR A WITNESS'S ABILITY TO TESTIFY

State supreme courts and legislatures are deeply divided on whether the Sixth Amendment permits a child witness to testify outside the defendant's presence even where the defendant's presence would not impair the witness's ability to communicate. That entrenched division of authority on an important issue requires this Court's review.

A. The Courts Are Divided Over Whether *Craig* Applies Even When Confrontation Would Not Impair the Witness's Ability To Testify

The Supreme Courts of Connecticut, Kentucky, Missouri, and Tennessee have all held that a child witness may not testify outside the defendant's presence unless face-to-face confrontation would impair the witness's ability to testify. The highest courts of Colorado and Texas, by contrast, have agreed with the court below that face-to-face confrontation may be denied *whether or not* the defendant's presence would impair the witness's ability to testify.

1. The Connecticut Supreme Court has addressed this issue on three occasions, most recently in *State* v. *Bronson*, 779 A.2d 95 (Conn. 2001). In that case, the trial court had excused a child witness from testifying in the defendant's presence after she had a "breakdown on the witness stand" and "began to cry." *Id.* at 99-100. The defendant moved for an expert assessment of whether the witness's ability to testify was impaired, but the court denied the motion. *Id.* at 102. The Connecticut Supreme Court reversed. Canvassing its earlier decisions, the court held in no uncertain terms that impairment of ability to testify is required before a witness may testify outside the defendant's presence:

> "[T]he state must show that the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." . . . [T]he criteria to be assessed in this evaluation must not include the possible trauma the victim might experience by testifying in the presence of the defendant. "[I]n light of the constitutional right of confrontation at stake here, the primary focus of the trial court's inquiry must be on the *reliability* of the minor victim's testimony, not on the *injury* that the victim may suffer by testifying in the presence of the accused." Thus, it is not sufficient

> that the victim cried. The inquiry must be allowed to go further and determine whether there is a loss of the witness' reliability.

Id. at 101-102 (relying on "'confrontation clause of both the federal and state constitutions'") (citations omitted). Because the defendant had not had an adequate opportunity to develop evidence of the witness's ability to testify, the court reversed the conviction. *Id.* at 104; see also *State* v. *Bonello*, 554 A.2d 277, 281-282 (Conn. 1989) ("interest in protecting children from the trauma associated with testifying before the accused" insufficient absent impairment of "truth-seeking function of the criminal trial"); *State* v. *Jarzbek*, 529 A.2d 1245, 1256 (Conn. 1987) ("federal constitution" requires that "primary focus . . . be on the reliability of the minor victim's testimony, not on the injury that the victim may suffer by testifying in the presence of the accused").

The Kentucky Supreme Court has twice come to the same conclusion. In *George* v. *Commonwealth*, 885 S.W.2d 938 (Ky. 1994), the trial court had permitted the witness to testify outside the defendant's presence after the State's expert opined that the child "could testify in her father's presence" but "would be more traumatized than the average child by doing so." *Id.* at 940. The Kentucky Supreme Court found it "apparent that the trial court failed to use the standard . . . necessary to use TV testimony." *Id.* at 941. It cited *Craig* for the proposition that "[s]ensibilities of the witness and the protection of minor victims of sex crimes from further trauma are of societal concern, but the primary consideration remains whether the testimony can or cannot be otherwise truthfully obtained." *Id.* at 940. Six years later, the court reversed another conviction on the ground that the Sixth Amendment permits denial of confrontation only where "reasonably necessary to obtain the testimony of the child"—for example, because "the child refuse[s] to testify in the presence of the defendant." *Price* v. *Commonwealth*, 31 S.W.3d 885, 893-894 (Ky. 2000).

The Missouri Supreme Court reached the same conclusion in *State* v. *Sanchez*, 752 S.W.2d 319 (Mo. 1988). In that case, the trial court had permitted child witnesses to testify outside the defendant's presence after stating that "it would be emotionally traumatic to them, to do it in the usual fashion." *Id.* at 321. The Missouri Supreme Court held that, under the "confrontation clauses of the United States and Missouri Constitutions," the State must prove "not merely that it would be less traumatic for the child to testify" outside the defendant's presence, "but that the emotional and psychological trauma which would result from testifying . . . in the personal presence of the defendant in effect makes the child unavailable as a witness at the time of trial." *Id.* at 322-323. Because the State had not adduced such proof, the court reversed the conviction. *Id.* at 323; see also *State* v. *Naucke*, 829 S.W.2d 445, 448 (Mo. 1992) (reaffirming, in light of *Craig*, that "the emotional and psychological trauma . . . [must] in effect make[] the child unavailable as a witness at trial").[5]

Finally, the Tennessee Supreme Court adopted the same view in *State* v. *Deuter*, 839 S.W.2d 391 (Tenn. 1992). There, the State had "presented no evidence" justifying denial of confrontation, and had denied a contemporaneous opportunity to cross-examine. *Id.* at 392. Although the Tennessee Supreme Court primarily faulted the lack of cross-examination, it also emphasized that, under *Craig*, a child can testify outside the defendant's presence only if confrontation would result in "'serious emotional distress such that the child could not reasonably communicate.'" *Id.* at 393-394. "[T]he interest to be protected is the child-wit-

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[5] Although *Sanchez* and *Naucke* involved videotaped testimony rather than closed-circuit television, courts have uniformly applied the same *Craig* standard to both. See *Naucke*, 829 S.W.2d at 451-454; *State* v. *Cameron*, 721 A.2d 493, 498 (Vt. 1998); *Brady* v. *State*, 575 N.E.2d 981, 986 (Ind. 1991); *Thomas* v. *People*, 803 P.2d 144, 151 (Colo. 1990); cf. *Commonwealth* v. *Willis*, 716 S.W.2d 224, 228 (Ky. 1986).

ness's *ability to testify*," and the "trauma to the child [must] be such that the child's ability to communicate would be impaired." *Id.* at 394 (emphasis in original). Because the "record show[ed] conclusively that the procedure followed did not meet the requirements set forth in *Craig*," the court reversed. *Ibid.*

2. The court below, by contrast, joined the highest courts of Colorado and Texas in holding that *Craig* applies even where the trauma of testifying in the defendant's presence would *not* impair the witness's ability to communicate. The court below acknowledged *Craig*'s statement that its holding applied "'at least where such trauma would impair the child's ability to communicate,'" but "disagree[d]" that this "one phrase" limited *Craig*'s "multi-factored test of necessity." App., *infra*, 9a-10a (emphasis omitted). "Nowhere else does *Craig* suggest that the focus of the necessity inquiry should be on whether the trauma would impair the child's ability to give testimony." *Id.* at 10a. A "categorical requirement" of impairment, the court opined, would "run counter to the detailed, three-part test" *Craig* set forth to "determine the necessity of a special procedure." *Ibid.*

The Colorado Supreme Court reached the same conclusion in *Thomas* v. *People*, 803 P.2d 144 (Colo. 1990). That case concerned a statute that authorized a witness to testify outside the defendant's presence if the witness was "medically unavailable," a term defined to include situations where the witness *could* testify in the defendant's presence but would suffer emotional distress from doing so. See *id.* at 148. The court interpreted *Craig* to apply even if the trauma would not impair the witness's ability to testify:

> In summation, [*Craig*] stated that its holding applies "at least where such trauma would impair the child's ability to communicate." The reasoning of the Court's opinion, however, suggests that its holding would apply in cases in which the trauma would be injurious

> to the child *but would not have the specific adverse effect of impairing the child's ability to communicate.*

Id. at 150 n.13 (citation omitted; emphasis added).

In *Marx* v. *State*, 987 S.W.2d 577 (Tex. Crim. App. 1999), Texas's highest criminal court reached the same conclusion, finding *Craig*'s exception applicable whether or not a witness could testify in the defendant's presence. Evidence showed that one of the witnesses was "ready to testify in [the defendant's] presence" and "'would probably testify okay,'" but was "'real scared' and ... would probably be traumatized." *Id.* at 579. The court held the prospect of "significant emotional trauma" by itself sufficient: "[T]he special procedure was necessary to protect [the witness] from the significant emotional trauma of having to testify in appellant's physical presence." *Id.* at 580-581.

Other state supreme courts have likewise upheld convictions where face-to-face confrontation was denied based solely on the prospect of trauma, without any finding that the witness's ability to testify would be impaired. See, *e.g.*, *State* v. *Murrell*, 393 S.E.2d 919, 922 (S.C. 1990); *Glendening* v. *State*, 536 So. 2d 212, 218 (Fla. 1988); *State* v. *Twist*, 528 A.2d 1250, 1257 (Me. 1987). And intermediate courts have also rejected the argument that "the sole purpose of the *Craig* test is to assess whether the witness's ability to testify in court while in the presence of the defendant would be impaired," finding "the *Craig* test to be broader in its purpose to also encompass the extent of probable trauma to the child witness." *State* v. *Bailey*, No. 01-0955, 2002 WL 31308238, at *2 (Iowa App. Oct. 16, 2002).

3. That division of authority has been widely noted. In *Blume* v. *State*, 797 P.2d 664 (Alaska App. 1990), the court identified this issue and stated that "[m]ost cases require a showing that the child's ability to give reliable testimony would be significantly impaired by the presence of the accused." *Id.* at 672. It cited eight cases for that majority view and two to the contrary. *Id.* at 672 n.10. Other courts

have similarly noted that this is an unresolved and important issue. See *United States* v. *Carrier*, 9 F.3d 867, 869 n.2 (10th Cir. 1993) ("It is an open question whether *Craig*'s 'more than *de minimis* trauma' finding can be made solely upon a showing that the child would suffer severe or permanent trauma from testifying in the defendant's presence, without a showing that the child would be unable to communicate." (collecting authorities)); *Thomas* v. *Gunter*, 962 F.2d 1477, 1482 & n.6 (10th Cir. 1992) (similar); *State* v. *Vincent*, 768 P.2d 150, 164-165 (Ariz. 1989) (warning that it was a "weighty question" whether confrontation can be denied where "face-to-face testimony would likely be traumatic, but not so disabling as to render the child unable to reasonably communicate").[6] Only review by this Court can resolve that conflict and restore uniformity to this area of constitutional law.

B. Legislatures Need Guidance on *Craig*'s Scope

Confusion extends beyond courts to legislatures as well. Sixteen States have enacted statutes that permit child witnesses to testify outside the defendant's presence without a finding that the defendant's presence would impair their ability to testify.[7] Those legislatures evidently concluded

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[6] At least one commentator has also identified this as an "open question" that has divided the States. See Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 Hastings L.J. 1259, 1270-1272 (1992).

[7] Ariz. Rev. Stat. §§ 13-4251 to -4253; 11 Del. Code § 3511; Fla. Stat. §§ 92.53, .54; 725 I.L.C.S. 5/106B-5(a)(2); Miss. Code §§ 13-1-405(1); -407(1); Neb. Rev. Stat. § 29-1926; N.J. Stat. § 2A:84A-32.4(b); R.I. Gen. Laws § 11-37-13.2(a); S.C. Code § 16-3-1550(E); S.D.C.L. § 23A-12-9; Wis. Stat. § 967.04(7); Utah R. Crim. Proc. 15.5(2)(a); cf. Colo. Rev. Stat. § 18-3-413 (medical unavailability); Kan. Stat. § 22-3434(b) (same); Minn. Stat. § 595.02(4)(c) (same); Tex. C.C.P. art. 38.071(1), (8) (same). Ten other States do not require impairment, but the procedures they authorize arguably preserve confrontation. See Ala. Code §§ 15-25-2, -3; Ark. Code § 16-44-203; Ind. Code § 35-37-4-8; Mont. Stat. § 46-16-216; N.H. Rev. Stat. § 517:13-a; N.M. Stat. § 30-9-17; N.Y. C.P.L. § 65.10(1); Ohio Rev. Code § 2945.481; Ore. Rev. Stat. § 40.460(24); Va. Code § 18.2-67.9.

that the Sixth Amendment requires no such finding. In fact, five statutes list emotional distress and impairment of ability to testify as *alternative* grounds for denying confrontation, making clear that the latter is not required.[8]

Twenty jurisdictions, by contrast, have enacted statutes that *do* expressly require impairment of the witness's ability to testify.[9] While some may have imposed that limit as a matter of policy, at least five apparently thought it constitutionally required. Three enacted the Uniform Child Witness Testimony by Alternative Methods Act, which requires "serious emotional trauma that would substantially impair the child's ability to communicate." Uniform Act § 5(a)(2).[10] Invoking *Craig* as the basis for that standard, the Uniform Act's official commentary describes *Craig* as holding that "the child [must] suffer serious emotional stress and be traumatized to the extent the child could not reasonably be expected to communicate." *Id.* § 5 cmt.; see also *ibid.* ("*Craig* . . . require[s] . . . that the probable effect of the defendant's presence on the child witness would significantly

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[8] See Fla. Stat. § 92.54(1) (witness would "suffer at least moderate emotional or mental harm" *or* be unavailable); 725 I.L.C.S. 5/106B-5(a)(2) (witness would be unable to "reasonably communicate" *or* suffer "severe adverse effects"); Miss. Code § 13-1-407(1) (witness would "suffer traumatic emotional or mental distress" *or* be "otherwise unavailable"); S.D.C.L. § 23A-12-9 (confrontation would be "substantially detrimental to the well-being of the victim" *or* render him "otherwise unavailable"); Utah R. Crim. Proc. 15.5(2)(a) (witness would "suffer serious emotional or mental strain" *or* testimony would be "inherently unreliable").

[9] 18 U.S.C. § 3509(b)(1)(B); Alaska Stat. § 12.45.046(a)(2); Cal. Penal Code § 1347(b)(2); Conn. Gen. Stat. § 54-86g(a); Ga. Code § 17-8-55(a)(2); Haw. R. Evid. 616; Idaho Code § 9-1805(1)(b); Iowa Code § 915.38(1); Ky. Rev. Stat. § 421.350(5); La. Rev. Stat. § 15:283(A); Md. Code Crim. Proc. § 11-303(b)(1); Mich. Comp. L. § 600.2163a(17); Mo. Stat. § 491.680(2); Nev. Rev. Stat. § 50.580(1)(b); 12 Okla. Stat. § 2611.7(A)(2); 42 Pa. C.S. § 5985(a.1); Tenn. Code § 24-7-120(a)(3); Vt. R. Evid. 807(f); R.C.W. 9A.44.150(1)(c); Wyo. Stat. § 7-11-408(c)(iii).

[10] Idaho Code § 9-1805(1)(b); Nev. Rev. Stat. § 50.580(1)(b); 12 Okla. Stat. § 2611.7(A)(2).

impair the ability of the child to testify accurately."). In Hawaii, the official commentary to the relevant rule states that "[t]he preliminary determination that taking the child witness' testimony in the accused's presence 'would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate' is necessary to avoid offending the Confrontation Clause, see *Maryland* v. *Craig*, 497 U.S. 836 (1990)." Haw. R. Evid. 616 cmt. Finally, in a fifth State, Louisiana, the legislature adopted the impairment requirement only after its previous standard was struck down. See La. Rev. Stat. § 15:283(A); *State* v. *Murphy*, 542 So. 2d 1373, 1376 (La. 1989).

No less than the courts that must apply the law, the legislatures that draft the law need clarity. If confrontation may be denied only when it would impair the witness's ability to testify, statutes that lack that requirement should be amended to avoid constitutional violations. Conversely, if confrontation may be denied on a lesser showing, States that currently require impairment should be permitted to determine whether to retain that requirement, unencumbered by imagined constitutional constraints.

C. The Issue Is Important and Recurring

Craig impacts cases across the country every day. Nearly 250,000 cases of child abuse are reported each year, see U.S. Dep't of Health & Human Servs., *Child Maltreatment 2004*, at 39 tbl.3-6 (2006), and at least 20,000 are tried, see Hafemeister, *Protecting Child Witnesses*, Violence & Victims, Spring 1996, at 71, 74. Most States have special provisions for child witnesses. See pp. 18-19, *supra*. And although the procedures are used in only a fraction of cases, see Hafemeister, *supra*, at 75 tbl.2, the large number of prosecutions ensures that *Craig* is relevant in thousands of cases each year.

The particular formulation of the *Craig* standard is critical. It is self-evident that testifying in a defendant's presence may be sufficiently traumatic to cause a child witness

"more than *de minimis*" emotional distress but not impair the witness's ability to testify. Indeed, many *adult* victims find testifying a traumatic experience but succeed in testifying nonetheless. Whether *Craig* requires impairment of ability to testify will thus be dispositive in a substantial number of cases. The question is also clearly ripe for review: The split of authority has been widely recognized and deepening for more than a decade. Further percolation would merely require additional States to choose sides.[11]

The importance of the question is also apparent from the fact that two members of this Court have urged review in *Craig*-related cases, even where the petitions failed to satisfy any traditional basis for review. In *Danner* v. *Kentucky*, 525 U.S. 1010 (1998), and *Marx* v. *Texas*, 528 U.S. 1034 (1999), Justices Scalia and Thomas dissented from the denial of certiorari, criticizing the state court decisions in those cases for failing to require proof that the witness would be unable to testify. See *Danner*, 525 U.S. at 1011 (arguing that case "comes nowhere close to fitting within *Craig*'s limited exception" because "[f]ar from being rendered mute with fear at the prospect of facing her father, Danner's daughter did not even rule out the possibility of testifying"); *Marx*, 528 U.S. at 1038 (witness "'want[ed] to' testify, and by all accounts was 'ready for that'"). Even though neither petition identified any split of authority or any other traditional basis for seeking this Court's review,[12] the dissenting Justices urged that review was necessary to "make

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[11] A split will likely never develop among *federal* circuits because, in federal cases, impairment of the witness's ability to testify is required by statute. 18 U.S.C. § 3509(b)(1)(B).

[12] The petition in *Danner* claimed a split with a single Sixth Circuit case over whether *expert testimony* of trauma was constitutionally required. See Pet. in No. 97-2057, at 6, 9 (Jun. 19, 1998). But that claim was meritless because the Sixth Circuit's ruling was based on a federal statute that does not apply to cases in state court. See Br. in Opp. in No. 97-2057, at 18 (Sept. 24, 1998). The petition in *Marx* did not allege any split at all. See Pet. in No. 98-9183 (Apr. 30, 1999).

clear that the exception we have created to the text of the Sixth Amendment is a narrow one." *Danner*, 525 U.S. at 1012. That members of this Court thought the issue sufficiently important to justify review *even absent* a conflict among state courts makes the need for review of *this* case—in which the petition *does* identify a well-defined conflict—particularly apparent.

II. THIS COURT SHOULD RECONSIDER *CRAIG* IN LIGHT OF ITS MORE RECENT DECISIONS

This Court should also grant the petition to reconsider *Craig* in light of its more recent decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006). *Crawford* and *Davis* undermine *Craig*'s reasoning in key respects.[13]

A. *Craig* Rests on a Rejected Understanding of the Term "Witnesses" in the Confrontation Clause

Craig did not dispute that the Confrontation Clause normally requires witnesses to testify in the presence of the accused. See 497 U.S. at 844. It held, however, that this requirement could be subordinated when public policy justified an exception. *Id.* at 853. For that point, it relied heavily on cases involving hearsay, particularly *Ohio* v. *Roberts*, 448 U.S. 56 (1980). *Craig* reasoned:

> [A] literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts*, 448 U.S. at 63. . . . Given our hearsay cases, the word "confront," as used in the Confrontation Clause,

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[13] To be clear, Mr. Vogelsberg does not dispute that the *results* of those cases are reconcilable: *Crawford* conditions admissibility of *previous* testimony on a prior opportunity to cross-examine and unavailability at trial, 541 U.S. at 68; *Craig* denies face-to-face confrontation of witnesses who *do* appear at trial, although it too preserves the right to cross-examine, 497 U.S. at 851-852. The fact that the *results* of the cases do not directly conflict, however, does not mean the cases' *rationales* can coexist. As explained below, they cannot.

> cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

Id. at 848-849. The hearsay cases were crucial to the Court's holding. Indeed, they were virtually the *only* substantial support for the Court's claim that face-to-face confrontation could be denied on public-policy grounds.[14]

At the time, that reasoning was defensible because the prevailing view (reflected in *Roberts*) was that *all* hearsay declarants were "witnesses against" the accused if their statements were offered against him at trial. See *Roberts*, 448 U.S. at 62-63; 3 Wigmore, *Evidence* § 1397, at 104 (2d ed. 1923). But *Crawford* and *Davis* have since rejected that premise. *Crawford* held that the term "witnesses" focuses on a particular type of declarant, namely, one who makes "testimonial" statements. 541 U.S. at 51. And *Davis* held that "[o]nly statements of this sort"—*i.e.*, *only* testimonial statements—"cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." 126 S. Ct. at 2273. After *Crawford* and *Davis*, hearsay exceptions are no longer exceptions to the defendant's right "to be confronted with the witnesses against him"; they simply reflect the fact that the declarants are not "witnesses." Indeed, *Crawford* and *Davis* specifically cite *Bourjaily* v. *United States*, 483

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[14] *Craig* also relied on prior-testimony cases such as *Mattox* v. *United States*, 156 U.S. 237 (1895), but those cases conditioned admissibility on an adequate opportunity to confront the witness face to face when the testimony was given. See *id.* at 244 ("The substance of the constitutional protection is preserved to the prisoner in *the advantage he has once had of seeing the witness face to face*, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." (emphasis added)). Those cases hardly support denying a defendant face-to-face confrontation altogether.

U.S. 171 (1987)—on which *Craig* relied, 497 U.S. at 848-849—as involving a hearsay declarant who was *not* a "witness." *Crawford*, 541 U.S. at 58; *Davis*, 126 S. Ct. at 2275.

Crawford and *Davis* thus destroy the linchpin of *Craig*'s rationale—that a hearsay declarant is "undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial." 497 U.S. at 849. Without that premise, *Craig*'s reasoning unravels. Hearsay exceptions no longer prove that a defendant may be denied his right to confront child witnesses who testify at trial: Nontestimonial hearsay declarants are not *witnesses*; child witnesses *are*. *Crawford* and *Davis* have thus eliminated the only significant precedential support *Craig* identified for its holding.

B. *Craig* Applied a Discredited Approach to Interpreting the Confrontation Clause

Crawford undermines *Craig* in a second respect. *Crawford* holds that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54. *Craig*, by contrast, made no attempt to ascertain whether framing-era law supported its exception for child witnesses. It did not.

1. First, while *Craig* held that face-to-face confrontation is "not the *sine qua non* of the confrontation right" and can be dispensed with so long as cross-examination is preserved, 497 U.S. at 847, face-to-face confrontation was indeed the confrontation right's historical core. Hale and Blackstone, for example, identified the "Opportunity of confronting the adverse Witnesses" as distinct from the opportunity to propound "occasional questions." Hale, *History of the Common Law* 258 (1713); see 3 Blackstone, *Commentaries* 373 (1st ed. 1768). Hawkins stated a "settled Rule" in felony cases that "no Evidence is to be given against a Prisoner but in his Presence." 2 Hawkins, *Pleas of the Crown* 428 (1st ed. 1721). Treason statutes guaranteed the right to confront witnesses "in person" or "face to face" without

mentioning cross-examination. 5 & 6 Edw. 6, c. 11, § 9 (1552); 1 & 2 Phil. & M., c. 10, § 11 (1554); 1 Eliz., c. 1, § 21 (1559); 1 Eliz., c. 5, § 10 (1559); 13 Eliz., c. 1, § 9 (1571); 13 Car. 2, c. 1, § 5 (1661).

The defendants in the famous treason cases that inspired the Confrontation Clause, moreover, demanded not merely cross-examination but also face-to-face confrontation. Raleigh, for instance, demanded "face to face" confrontation because Cobham "dare[d] not accuse" him in person, only obliquely referring to cross-examination. See 2 How. St. Tr. 1, 10-11, 15-16, 19, 23 (1603). And Fenwick demanded confrontation in part because "[a] man may swear a deposition reduced into writing, whose conscience perhaps would not let him publicly accuse the prisoner face to face." 13 How. St. Tr. 537, 592 (H.C. 1696) (Shower). Countless other authorities conditioned admissibility of prior testimony, not merely on an opportunity to cross-examine, but on whether the prisoner was *present* when the testimony was given.[15]

Cross-examination may well have been the principal *reason* the confrontation right was secured. But it was not the

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[15] Many sources mention presence without expressly mentioning cross-examination. See *Fenwick's Case*, 13 How. St. Tr. at 602 (Musgrave) (as to Marian procedure); Wood, *Institute* 671 (9th ed. 1763); *King* v. *Radbourne*, 1 Leach 457, 460-461, 168 Eng. Rep. 330, 332 (1787); *King* v. *Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789); *King* v. *Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter's note 1797); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31-32 (Super. L. 1798) (Haywood, J.); Peake, *Evidence* 40-41 (1801); MacNally, *Evidence* 296-301 (1802); Evans, *Evidence* 230 (1806); *Rex* v. *Forbes*, Holt 599 n.*, 599 n.*, 171 Eng. Rep. 354 n.*, 354 n.* (1814); Phillipps, *Evidence* 277 (2d ed. 1815). Others mention cross-examination as the *reason* presence was required. See *King* v. *Paine*, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K.B. 1696); *Rex* v. *Vipont*, 2 Burr. 1163, 97 Eng. Rep. 767 (K.B. 1761); *King* v. *Dingler*, 2 Leach 561, 562-563, 168 Eng. Rep. 383, 384 (1791); *State* v. *Webb*, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794); 4 Hawkins, *Pleas of the Crown* 423 (Leach 7th ed. 1795); 1 Chitty, *Criminal Law* 79 (1816); *Rex* v. *Smith*, Holt 614, 615, 171 Eng. Rep. 357, 360 (1817); *Johnston* v. *State*, 10 Tenn. (2 Yer.) 58, 59-60 (1821).

only reason. And even if it were, that would not change the fact that the right the Framers enshrined in constitutional text is the right to confrontation itself, not its underlying purpose. Denying confrontation merely because cross-examination has occurred "'abstracts from the right to its purposes, and then eliminates the right'"—which, as this Court recently made clear, it may not do. *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006) (quoting *Craig*, 497 U.S. at 862 (Scalia, J., dissenting)).

2. Framing-era law also did not recognize any confrontation exception for child witnesses. Courts and treatises showed a keen awareness of the unique evidentiary difficulties posed by child rape cases; some relaxed *other* evidentiary rules, but *not* the right to confront witnesses who appear at trial. Even those more modest departures, moreover, were rejected as inconsistent with the rights of the accused years before the Sixth Amendment's framing.[16]

Writing in the 17th century, Hale noted that child rape cases posed "considerable" difficulties because the crime "is most times secret" and the child's testimony is often the only evidence "of the very doing of the fact." 1 Hale, *Pleas of the Crown* 634 (1736) (posthumous). The common law required all testimony to be sworn, but some children were too young to understand the obligations of an oath. Accordingly, Hale endorsed two departures from the rules of evidence where the child was too young to be sworn: First, the child could give her account in court unsworn; second, the child's "mother or other relations" could testify to her out-of-court statements. *Id.* at 634-635; see also 4 Blackstone, *Commentaries* 214-215 (1st ed. 1769). Hale cautioned that such evidence was not "in itself a sufficient testimony" to convict, but had to be corroborated. 1 Hale, *supra*, at 634. Child rape was "a most detestable crime," "ought severely and impartially to be punished," and was

[16] Many of the sources discussed below are also collected in Davies, *Not "the Framers' Design,"* 15 J.L. & Pol'y (forthcoming 2007).

"hard to be proved"; yet it was "harder to be defended by the party accused, tho never so innocent." *Id.* at 635.

Conspicuously absent from Hale's treatise is any suggestion that *emotional distress* could justify departure from the rules of evidence where a witness was competent to testify under oath (or its functional equivalent). Also conspicuously absent is any suggestion that a child could testify *at trial*—sworn *or* unsworn—outside the presence of the accused. Indeed, *no* framing-era case we have seen even contemplates the *possibility* that a child witness might testify at trial without confronting the accused.

Many courts, moreover, rejected even Hale's more modest proposals, holding child witnesses to the same standards as others. See *Rex* v. *Travers*, 2 Strange 700, 93 Eng. Rep. 793 (1726); *Omychund* v. *Barker*, 1 Atk. 22, 29, 26 Eng. Rep. 15, 20 (Ch. 1744); *King* v. *Powell*, 1 Leach 110, 168 Eng. Rep. 157 (1775) (reported 1789/1800). In 1766, the leading English manual for justices of the peace reversed its prior position and stated that "in no case shall an infant be admitted as evidence without oath." 1 Burn, *Justice of the Peace* 475 (10th ed. 1766). Most American manuals followed suit.[17] Finally, in the 1779 case of *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779) (reported 1789/1815), the issue was referred to and definitively resolved by the Twelve Judges—England's *en banc* court for criminal cases, which included Blackstone himself, see 1 East, *Pleas of the Crown* 443 (1803). The court unanimously rejected Hale's view, holding that "no testimony whatever can be legally received except upon oath," and that child hearsay "ought not to [be] received." *Brasier*, 1 Leach at 200, 168 Eng. Rep. at 202-203. In 1783, Blackstone's ninth edition—the version current in America when the Sixth Amendment

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[17] See Greenleaf, *Abridgment* 124 (1773); Starke, *Justice of Peace* 145 (1774); Grimké, *South-Carolina Justice of Peace* 192 (1788); Hening, *New Virginia Justice* 178 (1795). But see Parker, *Conductor Generalis* 170 (Hodge 1788) (quoting obsolete edition of Burn).

was adopted—cited *Brasier* unequivocally for the point that "it is now settled, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath." 4 Blackstone, *Commentaries* 214 (9th ed. 1783) (citation omitted). Thus, while framing-era authorities were well aware that child rape was a "most detestable crime" that entailed "considerable" difficulties to prosecute, they ultimately rejected those considerations as insufficiently compelling to justify infringing *any* rights of the accused—much less a right so fundamental as confrontation.

C. *Craig*'s Continuing Vitality Is Also an Important and Recurring Issue

Even more than the first question presented, whether *Craig* should still be followed *at all* is an important issue that warrants review. *Craig* is relevant in thousands of cases each year. *See* p. 20, *supra*. The court below conceded that "*Craig*'s days may be ripe for review," given "language from *Crawford* that would appear to call into question the continued validity of *Craig*." App., *infra*, 7a. Given *Craig*'s doubtful prognosis, it is not surprising that many reported cases have considered claims that *Craig* is no longer good law. See, *e.g.*, *State* v. *Henriod*, 131 P.3d 232 (Utah 2006). As those cases have recognized, however, only this Court can overrule *Craig*. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (lower courts must follow Supreme Court precedent even if it "'appears to rest on reasons rejected in some other line of decisions'").

The time for this Court to reconsider *Craig* has come. *Crawford* and *Craig* cannot rationally coexist. It does not make sense to apply *Crawford*'s rigorous, historically based standard to testimonial statements of out-of-court declarants (many of whom are only arguably "witnesses against" the accused), while applying *Craig* to allow witnesses *at trial* (who are *paradigmatic* "witnesses against" the accused) to testify in a manner inconsistent with the original confron-

tation right. Until this Court intervenes, defendants will continue to be convicted on the basis of a decision that no longer has a coherent rationale and that relies on a methodology the Court has since excoriated as "do[ing] violence to [the Framers'] design." *Crawford*, 541 U.S. at 67-68.

III. THIS CASE SQUARELY PRESENTS THE ISSUES FOR REVIEW

This case presents an ideal vehicle for addressing both questions presented. The case arises on direct review of a final judgment of conviction. The federal questions were addressed in a detailed published opinion by the court of appeals. And the State's only argument against review by the Wisconsin Supreme Court was that the court of appeals had issued a "flawless" opinion that "can simply be allowed to stand" as that State's definitive resolution of the legal issues presented. State Resp. 2.

This case also effectively highlights *Craig*'s practical operation. Even though Blake had *already testified* in Mr. Vogelsberg's presence once at the preliminary hearing (notwithstanding the earlier supposed threat), the court permitted denial of confrontation at trial after Blake's stepmother claimed that the earlier experience left him "very antsy" and "very bouncy" and a therapist phoned in boilerplate findings tracking *Craig*. 9/17 Tr. 8-31. If denying confrontation is objectionable where the witness "'want[ed] to' testify, and by all accounts was 'ready for that,'" *Marx*, 528 U.S. at 1038 (Scalia, J., dissenting from denial of certiorari), surely it is intolerable where the witness *in fact had successfully testified* in the defendant's presence once already.

The confrontation violation was also clearly prejudicial. Harmfulness is "determined on the basis of the remaining evidence" rather than speculation about how the unconfronted witness might have testified differently. *Coy*, 487 U.S. at 1022. Aside from Blake's account, the State's case rested almost entirely on hearsay admitted as prior consistent or inconsistent statements. See 9/23 Tr. 193-194,

218. Without Blake's testimony, none of that was admissible. See Wis. Stat. § 908.01(4)(a). And even if it were, Blake's account was still the only direct evidence of guilt.

Even beyond the question of *legal* prejudice, moreover, confrontation was essential to a fair trial here. Given the paucity of other evidence, the jury's ability to evaluate Blake's statements (both in and out of court) was critical. And while "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child[,] . . . by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Coy*, 487 U.S. at 1020. There was no shortage of candidates for the role of "malevolent adult" here: Ample evidence confirmed the antipathy between Mr. Vogelsberg and his ex-wife's daughters. One of them *admitted* to falsely accusing him of rape once before, and another may have been complicit. The jury, however, could only speculate what Blake might have said—and how he might have said it—in Mr. Vogelsberg's presence. In short, it is difficult to imagine a case in which the defendant's right to confront his accuser face to face was more essential to a determination of the truth.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2007

APPENDIX

APPENDIX A

COURT OF APPEALS
DECISION
DATED AND FILED
October 26, 2006
Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1293-CR
Cir. Ct. No. 2004CF139

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRED V. VOGELSBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 DYKMAN, J. Fred Vogelsberg appeals from a judgment of conviction for first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2003-04).[1] Vogelsberg contends that his state and federal rights to face his

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

accuser were violated when the victim testified from behind a screen at trial. We disagree and affirm.

Background

¶2 A jury convicted Fred Vogelsberg of first-degree sexual assault of his four-year-old grandson. Before trial, the State made a motion to permit the victim to testify at trial via closed circuit television to minimize the potential for trauma to the child. The court took testimony on the motion from the child's stepmother and his counselor. It also considered a police report indicating that Vogelsberg had threatened to harm the child if he ever told anyone about the abuse, and determined that the child would likely be further traumatized by having to face his abuser at trial. Over Vogelsberg's objections, the court ordered that the victim be allowed to testify from behind a screen to shield him from visual contact with Vogelsberg. Vogelsberg appeals.

Standard of Review

¶3 Whether an action by the circuit court violated a criminal defendant's right to confront an adverse witness is a question of constitutional fact. *State v. Barton*, 2006 WI App 18, ¶7, 289 Wis. 2d 206, 709 N.W.2d 93. "In reviewing questions of constitutional fact, we uphold a circuit court's factual findings unless clearly erroneous, but we independently determine whether those facts meet the constitutional standard." *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899 (citation omitted).

Discussion

¶4 The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right applies to state prosecutions by incorporation through the Fourteenth

Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The Wisconsin Constitution similarly provides that "[i]n all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face ...." WIS. CONST. art. I, § 7. Despite the state constitution's more direct guarantee to defendants of the right to "meet" their accusers "face to face," the Wisconsin Supreme Court has generally interpreted the state and federal rights of confrontation to be coextensive. *See, e.g., State v. Thomas*, 144 Wis. 2d 876, 887, 425 N.W.2d 641 (1988) (*Thomas I*); *State v. Burns*, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983).

¶5 Vogelsberg's primary contention is that the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), represents a shift in confrontation clause jurisprudence that overturns state and federal precedents permitting a witness to testify from behind a barrier upon a particularized showing of necessity. We will start by examining the leading state and federal pre-*Crawford* cases, then turn to *Crawford* and subsequent cases to determine *Crawford's* impact.

¶6 In *Thomas I*, 144 Wis. 2d at 880-81, the Wisconsin Supreme Court addressed the question of whether placing a screen between a child victim and a defendant violated the defendant's right to confront his accusers. The *Thomas I* court affirmed a first-degree child sexual assault conviction in which Thomas asserted his right to confrontation was violated by the placement of a screen between himself and his eight-year-old victim at the child's deposition. *Id.* Citing *Virgil v. State*, 84 Wis. 2d 166, 186, 267 N.W.2d 852 (1978), the court stated that "the cornerstone of the right of confrontation is not ... eyeball-to-eyeball presentment [of the witness] to the defendant" but the opportunity for "meaningful cross-examination of the witness." *Thomas I*, 144 Wis. 2d at 893.

¶7 The *Thomas I* court held that "[w]hile face-to-face confrontation is preferable at trial, this preference may

yield to other competing interests where, as here, the circuit court determines that ordinary court room procedures may aggravate the trauma of the child-witness." *Id.* at 881. *Thomas I* instructed trial courts to employ, as an exercise of their discretion, a "balancing formula" to determine "on a case-by-case basis" whether "the protection of the child through the placement of a physical barrier between the child and the accused ... outweigh[s] the preference for face-to-face confrontation." *Id.* at 893.

¶8 One day after the release of *Thomas I*, the U.S. Supreme Court decided *Coy v. Iowa*, 487 U.S. 1012 (1988), a challenge to an Iowa statute authorizing trial courts to place a screen between child victims and the accused at trial. In *Coy*, the trial court relied upon the statute and did not make particularized findings that Coy's two accusers were likely to be traumatized by having to face Coy in court. In a six-to-two decision[2] authored by Justice Scalia, the court affirmed its commitment to the literal right of defendants to confront their accusers. *Coy*, 487 U.S. at 1016-17 ("We have never doubted ... that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). The court struck down the Iowa statute because it "create[d] a legislatively imposed presumption of trauma." *Id.* at 1021. However, the court "le[ft] for another day ... the question whether any exceptions exist" to the criminal defendant's right to confront his accuser face-to-face. *Id.* Whatever exceptions there may be, the court stated that "they would surely be allowed only when necessary to further an important public policy," and by a court's particularized findings that a witness required special protection. *Id.*

¶9 In light of *Coy*, the Wisconsin Supreme Court granted a motion by the defendant in *Thomas I* to reconsider its

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[2] Justice Blackmun dissented, and was joined by Chief Justice Rehnquist. Justice Kennedy did not participate.

decision in his case. The court subsequently concluded in *State v. Thomas*, 150 Wis. 2d 374, 394, 442 N.W.2d 10 (1989) (*Thomas II*), that *Thomas I* was correctly decided and that there was "no need to modify any of the language of *Thomas* [*I*]." Nonetheless, *Thomas II* offered several pages of "explanatory comments" discussing the impact of *Coy*. *Id.* at 376. The *Thomas II* court concluded that:

> While the sweep of the *Coy* case is problematic, we can, with confidence, conclude that, although generalized legislative policy will not justify special procedures to protect a child witness from trauma, exceptions may be recognized when there are case-specific and witness-specific findings of necessity. Nevertheless, the "majority" opinion of Justice Scalia left for "another day" the question of whether any exceptions to "face-to-face" confrontation exist.
>
> While the Supreme Court, in the absence of findings justifying an exception, struck down the particular procedure utilized under the aegis of the Iowa statute, we conclude that it did not necessarily rule out that procedure or other procedures intended to implement the same public policy. Indeed, when the opinions of Justices O'Connor, White, Blackmun, and Rehnquist are coupled with the open-ended language of Justice Scalia in reference to particularized findings in particular cases, *Coy* appears to give a reasonably clear imprimatur to the utilization of unusual procedures when found to be necessary to protect child witnesses from the trauma of usual courtroom testimony.

Id. at 380-81 (citations and footnotes omitted). Applying this interpretation of *Coy* to Thomas's case, the supreme court concluded that the trial court made specific findings of fact that "without the special procedures" used in that case, "further traumatization of a vulnerable child witness would likely result." *Id.* at 388. The court further concluded that

these findings supported the trial court's exercise of its discretion to place a screen between the witness and the accused. *Id.* at 389-90.

¶10 The *Thomas II* court's view of how the U.S. Supreme Court would decide a confrontation clause challenge in which the trial court's action was supported by case-specific findings was prescient. In *Maryland v. Craig*, 497 U.S. 836, 855 (1990), the court decided the issue it had "le[ft] for another day" in *Coy*, concluding that

> if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Before authorizing the use of a barrier between the child witness and the accused, a trial court must find: (1) the use of the procedure is "necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* at 855-56 (citations omitted).

¶11 Justice Scalia dissented in *Craig*, stating that the "purpose of enshrining [the right to face-to-face confrontation] in the Constitution was to assure that none of the many policy interests [that arise] from time to time . . . could overcome a defendant's right to face his or her accusers in court." *Id.* at 861 (Scalia, J., dissenting). He concluded: "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Id.* at 870 (Scalia, J., dissenting).

¶12 In *Crawford*, 541 U.S. 36 (2004), Justice Scalia applied this strict view of the Confrontation Clause to a case involving an out-of-court testimonial statement. There, the court considered whether the admission of a recorded statement by Crawford's wife against him violated the Confrontation Clause when his wife did not testify at trial because of marital privilege. *Id.* at 40. Applying *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which held out-of-court testimonial evidence to be admissible upon a judicial determination that the evidence bore "adequate indicia of reliability," the trial court admitted the recorded statement on the ground that it showed "particularized guarantees of trustworthiness." *Id.* In an opinion joined by seven justices,[3] *Crawford* overruled *Roberts* as to testimonial evidence, holding that the only indicium of reliability sufficient to meet the requirements of the Confrontation Clause for testimonial evidence is face-to-face confrontation. *Id.* at 68-69. Thus, *Crawford* concluded that out-of-court testimonial evidence is admissible under the Confrontation Clause only when the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59.

¶13 Vogelsberg cites language from *Crawford* that would appear to call into question the continued validity of *Craig*. Vogelsberg notes that *Crawford* criticized the balancing of interests approach used in *Craig*: "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Id.* at 67-68. *Crawford* also contains other passages that suggest that *Craig*'s days may be ripe for review: "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the [text of the Confrontation Clause] is

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[3] Justices Rehnquist and O'Connor concurred in the result, though criticizing the majority's distinction between testimonial and non-testimonial evidence.

most naturally read as a reference to the right of confrontation at common law." *Id.* at 54; *see also id.* at 60 ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."). Despite these statements in *Crawford*, we disagree with Vogelsberg's assertion that *Crawford* overrules *Craig* and *Thomas I* and *II*.

¶14 Had the Supreme Court intended to overrule *Craig*, it would have done so explicitly. The majority opinion in *Crawford* does not discuss *Craig* or even mention it in passing. The only precedent that *Crawford* overruled was *Roberts*, and then, only with respect to testimonial statements. *See State v. Manuel*, 2005 WI 75, ¶60, 281 Wis. 2d 554, 697 N.W.2d 811.

¶15 We conclude that *Crawford* and *Craig* address distinct confrontation questions. *Crawford* concerns the admissibility of out-of-court "testimonial evidence" where the witness was not available for cross-examination. The fundamental issue in *Crawford* was the reliability of testimony. The Court concluded that the Constitution does not permit judicial determinations of reliability concerning out-of-court testimony; except for traditional common law exceptions, only confrontation at trial is sufficient to satisfy the Sixth Amendment. The issue in *Craig*, and in this case, is not the reliability of testimony—in both *Craig* and here, the accused had the opportunity to cross-examine the witness. Rather, the issue is whether the demands of the Confrontation Clause are met when, for public policy reasons and following a case-specific determination of necessity, a barrier is placed between the witness and the accused. *Craig* addressed this question, and *Crawford* did not.

¶16 Finally, we note that one commentator has opined that in *Crawford*'s wake "the rule of [*Craig*] is presumably preserved" because "*Crawford* addresses the question of *when* confrontation is required; *Craig* addresses the question of *what* procedures confrontation requires. The two

cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt." Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 8 (2004); *see also* Rorry Kinnally, *A Bad Case of Indigestion: Internalizing Changes in the Right to Confrontation After Crawford v. Washington Both Nationally and in Wisconsin*, 89 MARQ. L. REV. 625 (2006).

¶17 We know of no state or federal court that has concluded that *Crawford* overrules *Craig*. However, at least two federal circuit courts have implicitly concluded that *Craig* remains good law post-*Crawford* by applying *Craig*'s approach to resolve a confrontation clause dispute similar to that considered in *Craig*. *See United States v. Bordeaux*, 400 F.3d 548, 553-54 (8th Cir. 2005); *United States v. Yates*, 438 F.3d 1307, 1313-18 (11th Cir. 2006) (applying *Craig* to the question whether testimony via two-way video conference violated defendant's right to confront accused).

¶18 Alternatively, Vogelsberg contends that, if *Craig* remains viable, the trial court did not make the proper findings of necessity required by *Craig* that would justify the use of a barrier. He asserts that *Craig* authorizes procedures that shield a testifying child witness from contact with the accused only when the child's "trauma would impair the child's ability to communicate," *Craig*, 497 U.S. at 857, and that the trial court here failed to make such a finding. We disagree. Vogelsberg's view is based on one phrase in *Craig*, which he reads to the detriment of the case-specific, multi-factored test of necessity set forth in that decision.

¶19 In a concluding paragraph, the *Craig* court states:

> In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, *at least where such trauma would impair the*

> *child's ability to communicate*, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Craig, 497 U.S. at 857 (emphasis added). Nowhere else does *Craig* suggest that the focus of the necessity inquiry should be on whether the trauma would impair the child's ability to give testimony. In fact, a categorical requirement that the child's trauma must be such that he or she cannot speak would run counter to the detailed, three-part test to determine the necessity of a special procedure to shield the child witness from the accused. Furthermore, we have applied *Craig* in the past and have not read it to impose such a requirement. *See, e.g., State v. Street*, 202 Wis. 2d 533, 552-54, 551 N.W.2d 830 (Ct. App. 1996).

¶20 Finally, Vogelsberg has not contended that the court failed to make the three findings required by *Craig* to show the necessity of the procedure used in this case. Our independent review of the record shows that the trial court made the required findings. After discussing the testimony of the child's stepmother and counselor, the court determined "some type of barrier . . . is necessary to protect [the child's] welfare specifically." The court cited a police report indicating that a social worker told police that Vogelsberg had threatened to harm the child if he ever told anyone about the abuse. The court found that the child "would likely be traumatized by the defendant's presence when he testifies for the same reason that the allegations of sexual abuse, when coupled with this threat which has been related by the child to the authorities, establishes that traumatization is likely." The court also determined that the child's trauma would be beyond mere nervousness "primarily because of the threat which has been coupled with disclosure." Based on these findings, we conclude that the trial court's

use of a barrier between Vogelsberg and the child witness was appropriate and did not violate Vogelsberg's confrontation right.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

APPENDIX B

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January 9, 2007

To:

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You are hereby notified that the Court has entered the following order:

No. 2005AP1293-CR State v. Vogelsberg L.C.#2004CF139

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Fred V. Vogelsberg, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT
JEFFERSON COUNTY
BRANCH 4

Case No. 04 CF 139

STATE OF WISCONSIN,

Plaintiff,

-vs-

FRED V. VOGELSBERG,

Defendant.

MOTION HEARING

September 17, 2004

HONORABLE RANDY R. KOSCHNICK
Presiding Judge

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* * * * *

THE COURT: * * *

I am going to make my decision primarily based on what I've heard in court today and form my conclusions based on Ms. Perry's testimony as well as on the testimony of Ms. Millwood and Dr. Thompson.

Ms. Perry did testify that she is Blake's stepmother. That Blake has lived with her since June of this year, but that there had been overnight or weekend visits at her

house by Blake since March of this year. Blake is on medications for ADHD, which he takes in the morning; and medication to help him sleep, which he takes in the evening.

She testified credibly in my mind in all respects. There is an uncontroverted sense that Blake has acted out sexually on his own brother, that Blake is very hyper, that he has problems sleeping, more so in the past than more recently. Presumably because of the medications and, perhaps, also because of the passage of time.

She testified that Blake had urinated on his bedroom floor on at least one occasion and that he had defecated on his bedroom floor twice. And, significantly, Dr. Thompson testified that a child defecating on his bedroom floor is very unusual. It's likely to be the result of significant stress or significant oppositional behavior or some type of physical condition such as diarrhea.

Ms. Perry testified that she brought Blake to the preliminary hearing to this courthouse in May. She drove with him here and back after the hearing about a four and a half hour ride. On the way here, one bathroom stopped required for Blake, and on the way back, they stopped very often. He requested to use the bathroom often. He was very antsy and fidgety. He talked about the defendant being a robber and having observed him in handcuffs in the courtroom.

When Ms. Perry told Blake that Blake may have to testify again, Blake ran away from her and did not talk with her about it. Ms. Perry has the opinion that Blake testifying again would agitate Blake and would not be good for Blake.

I really place very limited weight on that, because she is not an expert. I allowed it, because she is his stepmother and has lived with him, but I don't give that opinion much weight today. I find Ms. Perry's testimony more valuable rather for the visual observations she has made of Blake.

Blake, obviously, has had many factors in his life in the recent past which have most likely contributed to stress,

changes in households, living with foster parents who could fairly be characterized as strangers as far as I know and then moving to his stepmother's home in June.

There is testimony today that the nightmares that he has experienced since March could be attributed to this change in residence and change in the various living patterns or household circumstances that he's experienced.

Blake did talk about the defendant in the context of describing his nightmares on one occasion to his stepmother. The defense questioning inquired as to whether Blake seeing Jenny, Rako, and Sue on the preliminary examination date may have been one of the causes for the difficult behaviors experienced on the way home after the hearing, but Ms. Perry testified that Blake has seen those relatives on other occasions without problem.

She also testified on cross examination by the defense that Blake talked non-stop on the way home from the preliminary hearing and she estimated the number of potty breaks to be fifteen.

Ms. Millwood testified that she's been counseling with Blake since June of this year. She has seen him on approximately six occasions for one hour outpatient sessions. In her opinion, to have Blake testify in front of Mr. Vogelsberg would be emotionally damaging to Blake, and in her opinion, the emotional damage would be more than diminimous.

She conceded on cross examination that testimony in front of an alleged perpetrator could be therapeutic for some children, but in her opinion it would not be therapeutic for Blake because Blake at this point is avoidant of abuse issues. Blake has told her that grandpa, meaning the defendant, had sexually abused him. Further, she testified in cross examination that Blake did not name any other sexual abuser. She described Blake as being guarded and avoidant on this issue of sexual abuse. And I found Ms. Millwood to be credible well.

Dr. Thompson is, likewise, a credible witness. He opined that the sleep disturbances that have been described by the other witnesses are not necessarily surprising given the number of changes in this young person's life recently. He testified that almost anything that causes stress could cause a loss of sleep. Even exciting things, such as birthday parties and other types of activities, similar types of activities, could result in loss of sleep.

Once again, he did testify that defecation on the floor in the child's bedroom is very unusual. I have already indicated his opinion in that regard.

He also testified that courtroom testimony for a child can be very confusing given the child's age and unfamiliar circumstances in a courtroom, but testifying also is sometimes therapeutic for a child. Obviously, Dr. Thompson has not personally interviewed Blake or met with Blake, and Dr. Thompson could not give an opinion one way or another today whether testimony would be harmful to Blake.

Dr. Thompson did indicate that the likelihood of emotional harm to a child would have a lot to do with whether the child felt threatened by the alleged perpetrator.

State's Exhibit Number 1 from the hearing on today's date, which is a police report, contains statements attributed to Blake and indicates that Handson, who is a social worker who was apparently with a police officer during this interview of the alleged victim on September 18th of last year, asked if grandpa ever says anything to him, meaning Blake, about this, meaning sexual abuse, and Blake said that Grandpa says naughty words. He ended up whispering to Handson that grandpa told him not to tell anyone or he would hurt him on his pee pee.

Handson asked how Grandpa would hurt his pee pee and Blake said Grandpa would quote, flick my pee pee, unquote. Handson asked where this stuff happened. Blake advised it happened at Grandpa's house upstairs. Then he said he had

to play with his pee pee and had to lick it, end quote. I agree with the State's characterization as conveyed through the questions to the doctor that that would be fairly considered as a threat. That grandpa told him not to tell anyone or he would hurt him on his pee pee. Blake specifically indicated that grandpa indicated that the manner of hurting Blake's pee pee would be to flick his pee pee.

Based upon all the evidence presented today, the Court does find that it is necessary to have some type of barrier between Blake and Mr. Vogelsberg during the time that Blake testifies, and that this is necessary to protect Blake's welfare specifically.

I make this finding based on the information in Exhibit Number 1 from today's hearing that there has been a threat by the defendant made against the alleged victim that if the alleged victim told anyone, that the defendant would cause physical consequences for revealing the alleged abuse.

I think that a five year old who was threatened by a relative not to talk about alleged sexual abuse is likely to suffer emotional harm if he is required to talk about the alleged sexual abuse in the presence of the alleged perpetrator. In addition, I find that Blake would likely be traumatized by the defendant's presence when he testifies for the same reason that the allegations of sexual abuse, when coupled with this threat which has been related by the child to the authorities, establishes that traumatization is likely.

Emotional trauma is likely suffered by the child if he's required to relate the abuse allegations in Mr. Vogelsberg's presence. I find that the emotional stress that he is likely to suffer would be more than diminimous. In other words, it would be beyond that normal level of nervousness or excitement or reluctance that one might expect when testifying in a courtroom about these types of allegations. Rather it's likely that the emotional stress would be substantial, once

again, primarily because of the threat which has been coupled with disclosure.

I will devise a barrier that is minimally obtrusive. It would only be obtrusive as necessary to prevent Blake from having to see Mr. Vogelsberg when Blake testifies. I haven't decided whether it will be a screen or have Mr. Vogelsberg placed somewhere else in the courtroom or whether I will use closed circuit television, but what I need to accomplish is that Blake will not be able to see Mr. Vogelsberg and Mr. Vogelsberg will not be able to see Blake in the courtroom when Blake testifies during the trial on this action.